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No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS,
PETITIONER

v.

FRED P. GARDNER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

A federal statute initially enacted in 1924 provides that veterans injured as the result of treatment at hospitals operated by the Department of Veterans Affairs may, in some circumstances, be entitled to disability compensation. For at least 60 years VA regulations have uniformly construed this statute to provide for compensation only where there is a showing of fault or "accident" on the part of the VA. The question in this case is whether the Court of Appeals for the Federal Circuit erred in refusing to defer to this longstanding administrative construction and in holding, instead, that the statute creates liability without fault.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Solicitor General, on behalf of the Secretary of Veterans Affairs, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 5 F.3d 1456. The opinion of the Court of Veterans Appeals (App., *infra*, 22a-30a) is reported at 1 Vet. App. 584. The opinion of the Board of Veterans' Appeals (App., *infra*, 32a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1993. On December 6, 1993, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 38 U.S.C. 1151 (Supp. IV 1992) provides as follows:

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Secretary [of Veterans Affairs], or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

2. The current regulation implementing Section 1151, 38 C.F.R. 3.358(c), provides in part as follows:

> (c) *Cause.*
>
> * * * * *
>
> (3) Compensation is not payable for either the contemplated or foreseeable after[-]results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

3. Section 31 of the Act of Mar. 28, 1934, ch. 102, Tit. III, 48 Stat. 526, formerly codified at 38 U.S.C. 501a (1952), provided as follows (before its repeal by the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, § 2202(132), 71 Stat. 168):

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury,

as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of the Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred, or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

4. Section 213 of the World War Veterans' Act, 1924, ch. 320, 43 Stat. 623, provided as follows (before its repeal by the Act of Mar. 20, 1933, ch. 3, Tit. I, § 17, 48 Stat. 11):

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medical or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury

> or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or death was the result of military service during the World War. The benefits of this section shall be in lieu of the benefits under the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes,' approved September 7, 1916; and from any payments due hereunder shall be deducted all amounts paid by any person other than [the] United States as damages or compensation for such injury, aggravation, or death: *Provided*, That application be made for such benefits within one year after such injury or aggravation was suffered or such death occurred or after the passage of this Act or whichever is the latest date.

STATEMENT

Respondent served on active duty with the United States armed forces from April, 1953, to January, 1955. App., *infra*, 33a. In 1986 respondent was admitted to a hospital operated by the Department of Veterans Affairs (VA)[1] for evaluation and treatment of pain in his legs. *Ibid.* The condition for which respondent sought treatment was not connected in any way to his military service.[2] See *id.* at

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[1] Like the court of appeals (App., *infra*, 2a n.1), we refer to both the Department and its predecessors, the Veterans' Administration and Veterans' Bureau, as the VA.

[2] Veterans with non-service-connected conditions may be eligible for VA medical care, subject to availability of facilities, based on such criteria as age, ability to pay for care,

2a. VA physicians correctly diagnosed a herniated disc, and after other treatments failed they performed surgery to remove the disc. *Ibid.*

Although respondent's surgery was apparently successful in removing the herniated disc, respondent subsequently experienced further problems with his left leg and ankle. App., *infra*, 34a-35a. Asserting that those problems resulted from the surgery, respondent filed a claim for disability benefits under 38 U.S.C. 1151 (Supp. IV 1992). That statute provides that an incremental disability resulting from "an injury, or an aggravation of an injury, [suffered] as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary" will be treated as though it were "service-connected," thus making the veteran eligible for a variety of medical, disability and other benefits.[3]

The VA's regional office denied respondent's claim for disability benefits (see App., *infra*, 2a), and

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and whether the veteran has a separate, service-connected condition. Respondent was entitled to VA care for his non-service-connected back condition under what was then 38 U.S.C. 610(a)(1)(B) (1982), now recodified at 38 U.S.C. 1710(a)(1)(I) (Supp. IV 1992).

[3] Although not so limited by its terms, as a practical matter Section 1151 is important today only for claims, like respondent's, based on incremental disabilities resulting from care provided for non-service-connected conditions. Any incremental disability resulting from care provided for a service-connected condition is independently compensable, without any showing of fault, under other statutory and regulatory provisions. See 38 U.S.C. 1110, 1121, 1131 (Supp. IV 1992); 38 C.F.R. 3.310(a).

the Department's Board of Veterans' Appeals affirmed. *Id.* at 32a-40a. After reviewing the medical evidence (*id.* at 33a-35a), the Board pointed out (*id.* at 36a) that under Section 3.358(c)(3) of the Department's regulations, a disability will be treated as compensable under Section 1151 only if it "proximately resulted [from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA, or from the occurrence of an "accident," defined in the regulation as "an unforeseen, untoward event."[4] 38 C.F.R. 3.358(c)(3). Reviewing the evidence in light of that standard, the Board found (App., *infra*, 37a) no "indication that treatment afforded [respondent] was in any way negligent, or at variance with sound medical practice, or was otherwise at fault." Similarly, the Board found no "untoward result in the sense contemplated by the law and regulation." *Id.* at 37a. The Board therefore denied respondent's claim.

The Court of Veterans Appeals reversed. App., *infra*, 22a-30a. It held that the statute itself neither imposed nor authorized the fault-or-accident requirement invoked by the Board under Section 3.358(c)(3) of the regulations. The court reasoned (App., *infra*, 25a-27a) that the statute's plain language imposed no fault requirement, and that a no-fault construction was plausible and would not lead to absurd results. The court rejected (*id.* at

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[4] The VA previously interpreted the "unforeseeability" aspect of this definition quite strictly. See Op. VA Gen. Coun. 2-78 (1978). In December, 1990, the VA adopted a broader construction, treating as "accidental" those consequences of medical or surgical care that are "not reasonably foreseeable." See Op. VA Gen. Coun. 99-90, at 10 (1990).

28a-30a) the Secretary's arguments that the legislative history demonstrated an intent to provide compensation only in cases of fault or accident, that repeated congressional reenactment or amendment of the statutory language had ratified its longstanding regulatory interpretation by the Secretary, and that the Secretary's construction was entitled to deference. The court therefore invalidated Section 3.358(c)(3) as inconsistent with the statute. App., *infra*, 30a. Because the Board had relied on Section 3.358(c)(3) in reaching its decision, the court remanded the case for a redetermination of respondent's claim without reference to that provision.

The Court of Appeals for the Federal Circuit affirmed. App., *infra*, 1a-21a. Like the Court of Veterans Appeals, the Federal Circuit reasoned that the plain language of the statute lacked a fault or accident element; it rejected the Secretary's contention that the statutory language referring to injuries suffered "as the result of" VA care was at least ambiguous on this point. *Id.* at 4a-9a. Although it undertook (*id.* at 9a-18a) an extensive review of the history of the statute's original enactment, reenactment, and regulatory interpretation, the court concluded (*id.* at 18a) that the Secretary had failed to make the "extraordinarily strong showing of clear legislative intent" (*id.* at 9a) necessary to convince the court to depart from what it viewed as the clear language of the statute. The court declined to defer to the Secretary's interpretation of the statute, on the grounds that the statutory language was clear; that the regulatory interpretation was not contemporaneous with the original enactment of the statute; and that the regulation's long history was not highly probative in light of the fact that the Department's

regulations did not become subject to judicial review until the creation of the Court of Veterans Appeals in 1988. *Id.* at 18a-20a. Finally, the court rejected (*id.* at 20a-21a) the Secretary's argument that Congress had ratified the VA's interpretation of the statute by reenacting the statute, and amending it in related ways, after the regulation in question was well-established.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Federal Circuit has adopted a no-fault construction of a federal benefits statute that is contrary to the fault-based interpretation given to that statute for more than sixty years by the agency charged with its administration. The Department of Veterans Affairs estimates that, unless it is reversed, the court of appeals' construction will require additional federal expenditures of approximately $1 billion over the next five years. Moreover, the applicable jurisdictional provisions are such that, in the absence of legislative action, the court of appeals' decision in this case will permanently resolve this important federal statutory issue. In these circumstances, the case warrants review by this Court.

1. Section 1151 provides that "[w]here any veteran shall have suffered an injury * * * as the result of * * * medical or surgical treatment * * * awarded under any of the laws administered by the Secretary, * * * and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran," the VA will pay compensation for the incremental disability or death in the same manner as if

it were service-connected. 38 U.S.C. 1151 (Supp. IV 1992). The court of appeals' decision in this case rests primarily on what the court deemed to be the plain language of the statute: in the court's view, the statute "unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment." App., *infra*, 9a. That conclusion, however, ignores ambiguity inherent in the statutory language, and disregards the history and context of the provision. When one applies such "traditional tools of statutory construction," it becomes apparent that, contrary to the court of appeals' decision, "the precise question at issue" in this case cannot be finally resolved simply by reference to the statutory text. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 & n.9 (1984).

Section 1151 applies to veterans who have suffered an "injury" occurring "as the result of" one of the activities specified in the statute, including medical or surgical treatment. 38 U.S.C. 1151 (Supp. IV 1992). While the most general definition of the term "injury" is any "hurt, damage, or loss sustained," the word is also used to refer more specifically to "an unjust or undeserved infliction of suffering or harm," or, in its legal sense, to a "violation of another's rights for which the law allows an action." *Webster's Third New International Dictionary* 1164 (1986).[5] Thus, the word as used in the statute could

[5] See also I *The New Shorter Oxford English Dictionary* 1371 (1993), which gives as the primary definition "wrongful action or treatment; violation or infringement of another's rights; suffering wilfully inflicted; a wrongful act; a wrong inflicted or suffered."

well include some connotation of fault or of an unforeseen and untoward occurrence. Conversely, even the court of appeals' construction of Section 1151 would apparently not require compensation for incremental disabilities necessarily resulting from appropriate medical treatment—amputation of a leg, for example, in order to prevent death from the spread of gangrene—even though such results would presumably represent "hurt, damage, or loss sustained," and therefore qualify as "injuries" within the broadest possible definition. Thus, no single dictionary definition can by itself supply an unambiguously correct meaning for the word in its statutory context.

Moreover, a compensable "injury" must occur "as the result of" a specified activity. 38 U.S.C. 1151 (Supp. IV 1992). The court of appeals correctly observed that under that language "the specified treatment must *cause* the injury" for which the veteran claims compensation. App., *infra*, 8a. But the court passed too quickly from that statement to its conclusion that the statutory causation requirement could include no element of fault or unforeseeability. In many kinds of medical treatment, for example, some statistically predictable percentage of adverse complications will result from appropriate treatment, properly performed. It is by no means self-evident from the statutory text alone that all such outcomes should be considered to have "resulted from" the treatment received, rather than from the patient's own physiology or from simple misfortune. While it is true, as the court remarked (*ibid.*), that "[c]ausation and fault are fundamental, distinct concepts in the law," it is equally true that the law routinely recognizes the need for both factual and *legal* causation.

The VA's conclusion that faultless or foreseeable adverse medical outcomes like respondent's are insufficiently related to any "injury" occurring "as a result of" VA medical care to be within the intended scope of Section 1151 involves a routine sort of statutory interpretation that is not precluded by the "plain" language of Section 1151. See *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992) ("Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context."); *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292-293 (1988) (opinion of Kennedy, J.).

2. Even in isolation, therefore, the statutory language is not so clear and unambiguous as to justify the court of appeals' rejection of the Secretary's longstanding limiting construction. See App., *infra*, 18a-19a. That conclusion is reenforced when the statute is viewed in the context of its legislative and regulatory history. See, *e.g.*, *Chevron*, 467 U.S. at 843 n.9 (directing use of "traditional tools of statutory construction" in determining whether intent of statute is clear); *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1544 (1991) (finding no ambiguity after reviewing both text and legislative history). That history, discussed below, raises at the very least a significant question as to whether Congress intended to enact a no-fault compensation scheme for all adverse medical outcomes, rather than a more traditional fault-based system. Under those circumstances, the court of appeals erred in refusing to defer to the Secretary's construction of the statute.

Section 1151's first precursor was enacted in 1924 as Section 213 of the World War Veterans' Act, ch.

320, 43 Stat. 623 (reprinted at pages 4-5, *supra*). As demonstrated by the extensive excerpts from the legislative history of that Act quoted by the court of appeals (App., *infra*, 10a-13a), it is difficult to ascertain from that history alone whether either the VA or Congress at that time contemplated providing compensation only for injuries occurring "as the result of accident or negligence of treatment or unskillfulness —things that must sometimes happen," or also for those occurring where "the debtor does the best he can * * * without neglect * * * [and] [w]ith the best medical advice." *Id.* at 10a, 11a (emphasis omitted) (quoting testimony of VA Director).

In 1926, however—within two years after the initial enactment of the statute—General Frank Hines, the VA Director who suggested enactment of Section 213 and who testified before Congress in its favor, issued VA Regulation No. 137 (C.A. App. 102). That regulation provided that compensation would not be paid "for the ordinary residuals of disease or injury following accepted medical treatment," but would be paid if "additional disease or injury is the result of examination or treatment, *improperly given*." *Ibid.* (emphasis added). Shortly thereafter, General Hines promulgated Regulation No. 157, amending the quoted language to make clear that compensation would be paid "where there is satisfactory evidence of *malpractice, malfeasance, or misfeasance* on the part of the [VA]" (emphasis added). That regulation in turn was superseded in 1927 by Regulation No. 167 (C.A. App. 104), which replaced the "malpractice" language with the formulation that the "usual after results of approved medical care" would not entitle a patient to compensation. Thus, the court of appeals erred in discounting the

VA's construction of the statute on the ground that it was not contemporaneous with the enactment of the original provision. App., *infra*, 19a.

Contrary to the court of appeals' understanding (App., *infra*, 13a), it also appears that, in applying Regulation No. 167, the VA did in fact require claimants to show fault or accident in order to recover (although a showing of fault might not rise to the level of malpractice). Claim of Frank McKeown, 50 Op. VA Gen. Coun. 439 (1928); Claim of William Concannon, 65 Op. VA Gen. Coun. 429, 431 (1930) ("the benefits provided by Section 213 * * * may be awarded in this case, if the disability causing the death proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgment, etc., in furnishing the treatment, as distinguished from the usual after results of approved medical care and treatment properly administered"); see also 9 Comp. Gen. 515, 516 (1930) ("plain intent" of Section 213 was to grant compensation in cases involving accident or fault). That administrative interpretation was therefore well established by the time that Congress repealed Section 213, along with numerous other benefits provisions, as part of the Act of Mar. 20, 1933 (the Economy Act), ch. 3, Tit. I, § 17, 48 Stat. 11. It remained the established construction in 1934, when Congress enacted a successor provision in substantially the same terms as Section 213. Act of Mar. 28, 1934, ch. 102, Tit. III, § 31, 48 Stat. 526 (formerly codified at 38 U.S.C. 501a (1952)).

Congress is presumed to be aware of the established administrative and judicial interpretations of statutes that it reenacts, amends or adapts for other purposes, and to adopt such interpretations when

it makes no relevant change to the statutory language. *E.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974). In this case, moreover, the legislative history of the 1934 reenactment focused directly on the issue of fault. As the court of appeals noted (App., *infra*, 15a), the Senator who introduced the amendment restoring the benefits formerly provided under Section 213 described his proposal as covering cases where "a veteran is disabled by reason of *mistreatment* on the part of a Government agent, *as in a case of malpractice by a Government surgeon.*" 78 Cong. Rec. 3289 (1934) (emphasis added) (statement of Senator Steiwer). In a portion of his statement not quoted by the court, he added that "[t]here are only a limited number affected by this amendment—I think it is 65—who have suffered at the hands of [VA] physicians. They were swept off all the rolls by the Economy Act. We seek by this amendment to put that little group back where they can be dealt with generously by their Government." *Id.* at 3290; see also *Independent Offices Appropriations Bill for 1935: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 73d Cong., 2d Sess. 117 (1934). That very small estimate of the scope of statutory coverage indicates that the legislation's sponsor did not contemplate enactment (or reenactment) of any broad no-fault entitlement.[6]

The 1934 Congress that enacted what became 38 U.S.C. 501a (1934) thus did so against the back-

[6] In the year ending June 30, 1933, the VA reported admission of 66,332 World War I veterans to the VA's own hospitals alone for treatment of non-service-connected disabilities. Administrator of Veterans' Affairs Ann. Rep. 41 (1933).

drop of a well-established fault-or-accident requirement, and under the impression that it was accepting governmental responsibility for a small group of patients injured through mistreatment or malpractice at the hands of government agents.[7] The fault-or-accident requirement was explicitly reconfirmed, as the court of appeals acknowledged (App., *infra*, 16a), shortly after passage of Section 501a in 1934,

[7] The 1934 Congress also acted in an obvious and important historical context. The court of appeals emphasized (App., *infra*, 17a-18a) the remedial goals of Section 1151. Given the economic crisis that precipitated Section 213's repeal in the Economy Act, however, and the representation made to Congress that Senator Steiwer's amendment would restore benefits to only a "little group" of wronged veterans, it is highly unlikely that Congress intended in 1934 to enact (or reenact) a broad scheme of no-fault insurance against adverse medical outcomes for all veterans, whether treated for service-connected or non-service-connected disabilities. Moreover, such a scheme would have been obviously inconsistent with prevailing common law principles of recovery for adverse medical outcomes, so that its enactment should not be presumed in the absence of clearer evidence of congressional intent . See, *e.g.*, *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879); N. Singer, *Sutherland Statutory Construction* §§ 50.01-50.05, 61.01-61.06 (5th ed. 1992). The court of appeals thought it persuasive (App., *infra*, 17a) that the statute and legislative history provided no affirmative evidence that Congress intended to require claimants under what became Section 1151 to bear the "complex and difficult burden" of proving fault or accident. The court should instead have sought affirmative evidence that Congress intended to carve out an exception from the common law norm and relieve claimants from any burden of proof of fault, even one that is in fact less onerous (because of the possibility of recovery for medical "accidents") than that routinely borne by common law malpractice plaintiffs.

see VA Administrator's Decision No. 255, 1 Admin. Dec. V.A. 321, 323 (1934), and has been consistently maintained from that time through its current embodiment in 38 C.F.R. 3.358(c)(3).[8]

Congress has taken action with regard to the statute several times since 1934. In 1940, Congress enacted a separate provision, in substantially similar terms, that extended the coverage of Section 501a to all veterans submitting to examinations in connection with benefits claims.[9] 38 U.S.C. 501a-1 (1940). In 1957 and 1958, many veterans' benefits provisions, including Sections 501a and 501a-1, were repealed, revised, compiled, and reenacted in a comprehensive new codification.[10] See 38 U.S.C. 351 (1958). In 1962, Congress amended Section 351 to remove a two-year period of limitations on claims and to provide a specific offset for amounts recovered under the Federal Tort Claims Act on account of otherwise compensable injuries, and also enacted a provision setting effective dates for certain Section 351 awards.[11] Congress made further technical

[8] The predecessor to the current regulation was promulgated by the VA in 1936 and was published in the first edition of the Code of Federal Regulations in 1939. See 38 C.F.R. 2.1123(c) (1939). The regulation was promulgated in substantially its current form in 1961. 26 Fed. Reg. 1590-1591 (1961).

[9] Act of Oct. 17, 1940, ch. 893, § 12, 54 Stat. 1197. See S. Rep. No. 2198, 76th Cong., 3d Sess. 12 (1940).

[10] Veterans' Benefits Act of 1957, Pub. L. No. 85-56, §§ 351 (reenactment), 2202(132) (repeal), 71 Stat. 102, 168; Act of Sept. 2, 1958, Pub. L. No. 85-857, § 351, 72 Stat. 1124.

[11] Act of Oct. 15, 1962, Pub. L. No. 87-825, §§ 1 (enacting 38 U.S.C. 3010(c)), 3, 76 Stat. 948, 950. See H.R. Rep. No.

amendments to the statute in 1969, 1976, 1984, and 1991, the last of which also renumbered Section 351 as Section 1151.[12]

Despite this repeated congressional attention to the provision at issue in this case, there is no evidence of legislative dissatisfaction with the fault-or-accident requirement explicitly set out in the VA's regulations. The Secretary's long and consistent interpretation of the statute, the substantial evidence of congressional ratification by reenactment and long acquiescence, and the specific history and context of the 1934 legislation all argue persuasively that the Secretary's regulations are consistent with Congress's intent in passing and retaining Section 1151 and its predecessors. The court of appeals therefore erred in failing (App., *infra*, 18a-20a) to grant appropriate deference to the Secretary's construction of the statute.

3. As noted above (note 3, *supra*), the court of appeals' invalidation of Section 3.358(c)(3) will in practice affect only claims by veterans treated in VA facilities for non-service-connected conditions. The VA estimates, however, that it hospitalizes approximately 830,000 such patients each year; VA physicians provide another 22 million outpatient visits to all veterans each year. Although evaluation of the

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2123, 87th Cong., 2d Sess. (1962); S. Rep. No. 2042, 87th Cong., 2d Sess. (1962).

[12] Act of June 11, 1969, Pub. L. No. 91-24, § 3, 83 Stat. 33; Veterans Disability Compensation and Survivor Benefits Act of 1976, Pub. L. No. 94-433, § 404(19), 90 Stat. 1379; Veterans' Compensation and Program Improvements Amendments of 1984, Pub. L. No. 98-223, § 213(1), 98 Stat. 46; Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, §§ 4(a)(1), 5(a), 105 Stat. 403, 406 (1991).

likely financial impact of the decision in this case is difficult and necessarily imprecise, based on that volume of patient care and on an estimate of the number of non-negligent adverse outcomes occurring in government hospitals for a patient population of similar age, the VA estimates that the court of appeals' decision could result in increased government expenditures of approximately $1 billion over the next five years.[13]

In addition to its significant financial impact, the court of appeals' decision also raises important issues of the appropriate deference owed to the VA's interpretation of the statutes it administers. Parts of the opinion below could be read to call into question the deference that the Federal Circuit believes it owes to any VA regulation originally promulgated before the creation in 1988 of the Court of Veterans Appeals and the provision for review of that court's decisions in the Federal Circuit. App., *infra*, 19a-20a. This Court should exercise its supervisory authority to make clear that the VA's regulations are entitled to the same deference accorded to the regulations of other agencies. Finally, because the Federal Circuit has exclusive jurisdiction over challenges to the validity of the VA's regulations, 38 U.S.C. 7292(c) (Supp. IV 1992), the Secretary will have no opportunity to litigate the issue in this case in

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[13] This estimate is based on the VA's own statistics concerning in-patient and out-patient care provided, claims made by patients, and average compensation cost data, and on adverse outcome and successful claim statistics reported in Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990).

other courts of appeals. Indeed, because the Board of Veterans' Appeals is bound by the decision below and because the government has no right to appeal from adverse decisions rendered by the Board, 38 U.S.C. 7252(a) (Supp. IV 1992), the Secretary will have no opportunity to seek review of this issue before any court at all in any future case. These factors make review by this Court especially appropriate in the present case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1994

APPENDIX A

UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

No. 92-7025

FRED P. GARDNER, CLAIMANT-APPELLEE

v.

JESSE BROWN, Secretary of Veterans Affairs, RESPONDENT-APPELLANT

Sept. 13, 1993

Before ARCHER, MICHEL, and LOURIE, Circuit Judges.

ARCHER, Circuit Judge.

The Secretary of Veterans Affairs appeals from a judgment of the United States Court of Veterans Appeals (Veterans Court), No. 90-120 (entered Jan. 13, 1992). The Veterans Court reversed the decision of the Board of Veterans' Appeals holding that Gardner is not entitled to disability compensation, and remanded the case for further proceedings. 1 Vet. App. 584. We affirm.

I.

Fred P. Gardner, a veteran of the Korean conflict, underwent back surgery at a Department of Veterans Affairs (VA)[1] medical facility for a non-service-connected back condition. He asserts that as the result of the surgery he developed severe nerve damage in his left leg, resulting in pain, atrophy, and weakness, and that since the surgery his left ankle is severely impaired requiring him to wear a leg brace. Accordingly, Gardner filed a claim for disability compensation with the VA Regional Office in Waco, Texas.

The VA Regional Office denied Gardner's claim, and he sought review by the Board of Veterans' Appeals (BVA). The BVA held that in order for a veteran to receive disability compensation for an injury resulting from VA medical treatment under 38 U.S.C. § 1151 (Supp. III 1991) (formerly § 351[2]) and 38 C.F.R. § 3.358 (1992),[3]

> at least two elements must be present. First, there must be some demonstration in the record

[1] For simplicity, we refer to the Department of Veterans Affairs and its precursors, the Veterans' Administration and the Veterans' Bureau, as the "VA."

[2] The Department of Veterans Affairs Health-Care Personnel Act of 1991, Pub.L. No. 102-40, § 402(b)(1), 105 Stat. 187, 238, and the Department of Veterans Affairs Codification Act, Pub.L. No. 102-83, § 5, 105 Stat. 378, 406 (1991), redesignated most of the sections of Title 38, United States Code, so that the first two digits of the section number correspond to the section's respective chapter number. To avoid confusion we cite the current sections.

[3] The BVA is bound by the regulations of the VA 38 U.S.C. § 7104(c) (Supp. III 1991).

> that the treatment rendered resulted in some untoward result or that the treatment was negligent or showed error in judgment, lack of proper medical skill or some other instance of indicated fault. Second, it must be shown that, as a result of the aforementioned accident, negligence, etcetera there was additional disability.

The BVA concluded that Gardner was not entitled to disability compensation, finding that he did not prove that he suffered injury as the result of negligent treatment or an accident occurring during his treatment. Gardner appealed the decision of the BVA to the Court of Veterans Appeals.

The Veterans Court held that 38 C.F.R. § 3.358(c)(3) impermissibly imposed a fault or accident requirement in addition to the prerequisites for relief set out in 38 U.S.C. § 1151. The court reasoned that the plain language of the statute lacked a fault or accident element, that the legislative history was ambiguous as to fault or accident, that Congressional reenactment of the statute while the regulation was in force was not Congressional ratification of a fault or accident element, and that no deference was owed the VA's interpretation. The Veterans Court struck down 38 C.F.R. § 3.358(c)(3) as contrary to 38 U.S.C. § 1151 and beyond the authority of the VA.[4] The Veterans Court therefore reversed the BVA's decision denying Gardner compensation and remanded for a redetermination of eligibility.

[4] 38 U.S.C. § 7261(a)(3)(C) (Supp. III 1991) requires the Court of Veterans Appeals to "hold unlawful and set aside . . . regulations issued or adopted by the Secretary . . . found to be . . . in excess of statutory . . . authority, . . . or in violation of a statutory right."

The Secretary appeals from this decision.

II.

The sole issue presented in this appeal is whether the regulation, 38 C.F.R. § 3.358(c)(3), which requires a veteran to prove that he suffered disability as the result of negligent treatment or an accident occurring during treatment, is an invalid implementation of 38 U.S.C. § 1151.[5] The resolution of this question depends on the construction of 38 U.S.C. § 1151, which is a matter of law that we review *de novo*. 38 U.S.C. § 7292(d)(1) (Supp. III 1991); *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed.Cir. 1991).

A.

"The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, —— U.S. ——, ——, 113 S.Ct. 2151, 2157, 124 L.Ed.2d 368 (1993) (alteration omitted) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984)).

The statute at issue in this case, 38 U.S.C. § 1151, provides for compensation to veterans who are disabled by VA medical treatment or examination or vocational training. It states in pertinent part:

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[5] In the appeal to this court, no challenge can be made to the factual determinations that Gardner did not show that the VA treatment was negligent or that an accident occurred during treatment so as to satisfy the VA's regulation. 38 U.S.C. § 7292(d)(2) (Supp. III 1991).

> Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . ., awarded under any of the laws administered by the Secretary, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability or death compensation under this chapter . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

38 U.S.C. § 1151.

The interpretation of the statute asserted by the VA appears at 38 C.F.R. § 3.358 (1992). The regulation provides that a veteran must prove he suffered a disability, disease, or injury, or aggravation thereof, as the result of a specified VA service, and not merely coincidental with it. 38 C.F.R. § 3.358(c)(1). Furthermore, the VA will not pay compensation for "the continuance or natural progress" of a disease or injury treated by the VA. *Id.* § 3.358(b)(2). But the provision of the regulation at issue in this appeal and struck down by the Veterans Court requires the veteran to prove additionally that the VA treatment was faulty or that an accident occurred during treatment:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of

> a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care.

38 C.F.R. § 3.358(c)(3).

Unlike the regulation, the statute does not on its face include an element of VA fault or accident as a condition to compensation. Pursuant to 38 U.S.C. § 1151, the VA "shall" award service-connected compensation where a veteran shows he has suffered an "injury, or an aggravation of an injury" and that this injury or aggravation is the result of one of four VA services: (1) hospitalization; (2) medical or surgical treatment; (3) vocational rehabilitation; or (4) an examination.

The statute has two limitations to the mandatory grant of disability compensation to a veteran undergoing one of the four services listed above. First, the injury or aggravation of injury must be "the result of" one of the services. Second, the injury or aggravation of injury must *not* be "the result of" the veteran's own willful misconduct. The statute does not expressly require the veteran to prove the poor nature or lack of quality of the treatment received, or the occurrence of some mishap during treatment. Rather, compensation must be paid where the veteran proves only that he suffered an injury as the

result of a specified treatment and not as the result of his own willful misconduct.

The Secretary argues that the statutory language "as the result of" is ambiguous because the statute "fails to define or explain, in any manner, what is meant by the words 'as the result of.'" From this the Secretary reasons, it is likely that "Congress, as evidenced by the legislative history of the statute, intended that the VA limit compensation payments to those veterans with disabilities proximately caused by VA fault or through accidents."

We reject, however, the Secretary's premise—that the statutory language must be deemed ambiguous because the statute does not contain an express definition of the words at issue. To be sure, Congress may define terms in a statute. *E.g.*, 38 U.S.C. § 1101 (Supp. III 1991). But Congress is not required to define each and every word in a piece of legislation in order to express clearly its will. A phrase appearing in the context of a statute may be unambiguous where it "has a clearly accepted meaning in both legislative and judicial practice," *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, ——, 111 S.Ct. 1138, 1147, 113 L.Ed.2d 68 (1991), even though it is not explicitly defined by the statutory text. Indeed, terms are defined in statutes often for the very reason that such terms would be ambiguous without a statutory definition. That a term is not defined in a statute does not mean that the term is *per se* ambiguous.

We are convinced that "as the result of" as used in 38 U.S.C. § 1151 mandates only a causation requirement. *See Webster's Third New Int'l Dictionary* 1937 (1971) (defining "result" as "a conse-

quence, effect, issue, or conclusion"). Under section 1151 the specified treatment must *cause* the injury or the aggravation of injury. And willful misconduct of the veteran may not be a cause of the injury or aggravation.

The Secretary tenuously argues that causation in this instance may be defined as fault. Causation and fault however are fundamental, distinct concepts in the law. *See generally* William L. Prosser, *Handbook of the Law of Torts* §§ 30, 37, 45, 46, 48 (1941). Congress knows how to legislate expressly liability for fault and negligence. *E.g.*, Act of Apr. 22, 1908, ch. 149, 35 Stat. 65 (liability of common carriers by railroad in cases of negligence) (codified as amended at 45 U.S.C. § 51 (1988)). Congress also knows how to legislate liability without fault. *E.g.*, Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-950 (1988)). Moreover, section 1151 itself includes one culpability element: the injury or aggravation must not be the result of the *willful misconduct* of the *veteran*. Under this language the veteran's own negligence will not preclude him from receiving compensation. When section 1151 is read in its entirety it becomes evident that Congress's failure in section 1151 to require expressly the veteran to prove fault or accident occurring during treatment was both informed and intentional.

Finally, the VA's argument that causation incorporates fault or accident is belied by the facts that the BVA in its decision below could and did cleanly distinguish "two elements" for compensation—causation and fault or accident—and that the VA regulation 38 C.F.R. § 3.358 has causation considerations separate from the fault or accident requirement.

We therefore conclude that the Veterans Court correctly held that 38 U.S.C. § 1151 unambiguously does not require the veteran to prove that the VA treatment was faulty or that an accident occurred during the treatment.

B.

As noted above, the Secretary argues that from the legislative history it is likely that Congress intended a fault or accident element. Although "[r]ecourse to the legislative history of [section 1151] is unnecessary in light of the plain meaning of the statutory text," *Darby v. Cisneros*, —— U.S. ——, ——, 113 S.Ct. 2539, 2545, 125 L.Ed.2d 113 (1993), we may look to the legislative history "'to determine whether there is a *clearly expressed* legislative intention contrary to the statutory language.'" *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 395 (Fed.Cir.1990) (quoting *Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 629 (Fed.Cir.1989)). We emphasize that because the statutory language is clear, "we do not analyze th[e] history from a neutral viewpoint." *Id.* at 396. The Secretary must make an extraordinarily strong showing of clear legislative intent in order to convince us that Congress meant other than what it ultimately said. *See id.*

38 U.S.C. § 1151 has a long history. It was born in section 213 of the World War Veterans' Act, 1924, ch. 320, 43 Stat. 607, 623 (1924) ("1924 Act").[6] Prior to the 1924 Act, veterans could not

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[6] That section provided:

> That where any beneficiary of this bureau suffers or has suffered an injury or an aggravation of an existing injury as the result of training, hospitalization, or medi-

be compensated for injuries sustained as a result of VA medical treatment because such treatment was not service-connected.

The legislation was proposed by General Frank T. Hines, then-director of the United States Veterans' Bureau, as an amendment to the "war risk insurance act." *See World War Veterans' Legislation: Hearings on H.R. 7320 Before the House Committee on World War Veterans' Legislation*, 68th Cong., 1st Sess. 113 (1924) (hereinafter "*House Hearings*"). Each party cites in support of its respective construction of the 1924 Act the House committee hearings on House Bill 7320, which was enacted as section 213. These hearings have been cited often by the VA in its administration of the Act. In introducing the proposal, General Hines stated:

> [I]n cases of hospitalization for compensable diseases or injuries, where without fault of the patient, *as the result of accident or negligence of treatment or unskillfulness—things that must sometimes happen*—the patient is further injured or disabled, there is at present no provision for compensating him to the extent thereof. The Government having undertaken to bestow a benefit, has, in fact, inflicted a loss.

House Hearings, *supra*, at 113 (emphasis added).

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cal or surgical treatment, awarded to him by the director and not the result of his misconduct, and such injury or aggravation of an existing injury results in additional disability to or the death of such beneficiary, the benefits of this title shall be awarded in the same manner as though such disability, aggravation, or the death was the result of military service during the World War.

World War Veterans' Act, 1924, ch. 320, § 213, 43 Stat. 607, 623 (1924).

General Hines and Members of Congress then attempted to flesh out situations in which compensation would be payable:

> General HINES. . . . In the hospital, at the patient's consent, he may undergo a certain surgical operation, with the hope, on the best advice available, that it will overcome some disability, but instead of doing that it goes in the other direction. Now, he may have a considerable minor disability due to his service, but at the same time he finds himself totally disabled, and the bureau under the existing law has no way of compensating him.
>
> The CHAIRMAN. It might come from a spinal puncture done at his request?
>
> General HINES. That is true.
>
> The CHAIRMAN. Or an operation which was not successful?
>
> General HINES. That has occurred from a spinal puncture that I know of, and it seems to me manifestly unjust, that in good faith the man undergoes an operation, *the doctor does the best he can and without neglect*—
>
> The CHAIRMAN. And with the best medical advice.
>
> General HINES. With the best medical advice, *and still at the end of a certain period we find the man has a greater disability than he originally started with*, and we have no way of correcting in any measure that condition.
>
> The CHAIRMAN. In a certain number of cases from some operations lesions will occur which will incapacitate the patient also?

General HINES. And it may result—as we all know, *operations are never certain*—in death.

. . . .

Mr. RANKIN. Would the disability that they are being treated for have to rise to the dignity of being convincable? [sic] For instance, a great many fellows go to these hospitals to get examined and stay there a while until their case can be thoroughly examined. Suppose it was determined that they had no disability due to the service when they went there, but that they were injured in this process in some way, would this apply to them?

General HINES. *If they were injured*, for instance, in determining whether a man has or has not syphilis, *by a spinal puncture*—when they make the spinal puncture and get the results, they all seem to be satisfied whatever the result is—*if that results, as it might, that they would paralyze a man under that operation, under those circumstances that man would be entitled to compensation.*

House Hearings, supra, at 114 (emphasis added).

The record of House hearings also contains a letter from General Hines to the House committee, in which General Hines wrote:

> I concur in the principle that authority should exist for compensating the cases of disability due to the hazards of training upon the general theory and principle of the *workmen's compensation act* [no-fault liability]. I would extend the principle beyond this particular proposal to include also ratable disabilities *incurred without fault and due to the hazards of medical and surgical treatment.*

House Hearings, supra, at 122 (emphasis added).

Finally, General Hines reiterated before the Senate what he had said before the House:

> [A] man submitted to a spinal puncture in one of our hospitals, to determine whether his [service-connected] disability was due to misconduct or not, and as the result of the spinal puncture he was injured for a period, paralyzed practically, on one side, and he is claiming now that he is greatly disabled. There is no way for the bureau, even though *that mistake* was made by them, to in any way compensate him.

Veterans' Bureau Codification Act: Hearings on S. 2257 Before the Subcommittee of the Senate Committee on Finance, 68th Cong., 1st Sess. 102-03 (1924) (emphasis added).

Until 1926, the VA did not impose any fault or accident showing as a condition to compensation. In 1926, the VA promulgated Regulation No. 137 under the direction of General Hines. That regulation provided that "[c]ompensation . . . will not be paid for the ordinary residuals of disease or injury following *accepted* medical treatment nor for the continuation of the original disability where improvement can not be effected by *approved* medical or surgical treatment." VA Regulation No. 137, sec. 7701 (1926) (emphasis added), *reprinted in* United States Veterans' Bureau, *Regulations and Procedure: Active and Obsolete Issues as of December 31, 1928*, at 174 (1930) (hereinafter "*Obsolete Issues*"). In 1927, the regulation was revised to exclude "[t]he

usual after results of *approved* medical care and treatment *properly* administered." VA Regulation No. 167, sec. 7701.B(4) (1927) (emphasis added), *reprinted in Obsolete Issues, supra*, at 194.

Although the regulations used such language as "approved" and "properly administered" medical care, it does not appear that the VA actually excluded disability claims where the veteran could not prove fault or accident. For example, the Attorney General advised the VA that the phrase "as the result of" required a straightforward causal connection with no element of fault or accident on the part of VA personnel. *See* 35 Op. Att'y Gen. 76 (1926); 36 Op. Att'y Gen. 61, 63 (1929) ("It is probably impossible to state a general rule for determining whether such a causal connection is present in any given case."). In 1930, the Comptroller General considered the question whether a veteran who had suffered dermatitis as the result of x-ray treatment for service-connected tuberculosis could receive compensation. The Comptroller advised the Director of the Veterans' Bureau that such disability would be compensable; there was no discussion of the nature or quality of the specific x-ray treatments given. Comptroller General Decision No. A-31895, 9 Comp. Gen. 515 (1930). Nevertheless, in language broader than necessary, the Comptroller General stated that "[t]he plain intent of section 213 . . . was to afford veterans some measure of compensation in those cases in which the disability arises through accident, carelessness, negligence, lack of proper skill, error in judgment, etc., on the part of any person charged with a duty respecting the hospitalization, or medical or surgical treatment. . . ." *Id.* at 516.

In 1933, Congress repealed the World War Veterans' Act. *See* Economy Act, ch. 3, § 17, 48 Stat. 8, 11 (1933). Thereafter, in March 1934, Congress substantially reenacted the provisions of the repealed law. Act of Mar. 28, 1934, ch. 102, § 31, 48 Stat. 509, 526 ("1934 Act").[7] The Congressional discussion preceding the enactment of the 1934 Act expressed the same commitment to compensation as that present in the discussion preceding the enactment of the 1924 Act:

> Mr. STEIWER. The first proposal is that where, in a veterans' hospital, a veteran is disabled by reason of mistreatment on the part of a Government agent, as in a case of malpractice by a Government surgeon, that disability shall be treated just the same as a war disability, and the veteran shall be compensated in the same way.
>
> Mr. BORAH. Are we undertaking to cover cases of malpractice upon the part of physicians?

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[7] That section stated:

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws. . . .

Act of Mar. 28, 1934, ch. 102, § 31, 48 Stat. 509, 526.

Mr. STEIWER. Incidentally, we would. Of course, what we are trying to do is to protect the men who suffer from malpractice at the hands of Veterans' Administration physicians. That was in the old law; it was repealed by the Economy Act; and the effort at this time is to restore it.

. . . .

Mr. BORAH. . . . I am curious to know how it is provided that we shall determine that there has been a case of malpractice.

Mr. STEIWER. Mr. President, I do not know that the Veterans' Administration can determine that there has been a case of malpractice, but they do determine that the veteran is suffering from disability, and in some cases they have determined that the disability was caused by or aggravated by some mistreatment upon the part of the veterans' agencies. I do not think there has ever been a trial of a [VA] doctor to determine malpractice. . . .

78 Cong. Rec. 3289-90 (Feb. 27, 1934).

For the first time, in August 1934, the Administrator of the VA took the position that compensation was payable under the 1934 Act *only* where the disability arose through an accident or negligence. Department of Veterans Affairs, Precedential Op. Off. General Counsel 99-90, at 7 (1990). The Administrator based his interpretation of the 1934 Act on the fact that it was a reenactment of the 1924 Act, and that in 1930 the Comptroller General had stated that the 1924 Act was intended to compensate fault and accident. *Id.* From about 1934 to the present

the VA has promulgated various regulations requiring fault or accident, culminating in the regulation at issue today. *See id.* at 7-8.[8]

The legislative history convincingly demonstrates that Congress's paramount concern was to compensate veterans injured by VA medical treatment. The Congressional discussion preceding enactment includes at times the words fault and accident, and at other times speaks of no-fault liability. The resulting statute omits fault and accident from its language. Congress recognized that injuries would likely occur where the treatment was negligent or where an accident occurred during treatment, but there is no indication whatsoever in the legislative history or in the resulting legislative enactment that Congress intended to place on the veteran the complex and difficult burden of proving that negligence or an accident actually occurred during treatment as a condition to compensation. The World War Veterans' Act was remedial legislation and as such should be

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[8] The 1934 Act was amended several times, resulting in the present enactment, 38 U.S.C. § 1151; statutory language relevant to this appeal, however, was not changed. *See* Act of Oct. 17, 1940, ch. 893, § 12, 54 Stat. 1193, 1197 (adding compensation for examinations); Act of Mar. 24, 1943, ch. 22, § 3, 57 Stat. 43, 44 (adding compensation for vocational rehabilitation); Act of Sept. 2, 1958, Pub.L. No. 85-857, 72 Stat. 1105, 1124 (codifying the law at 38 U.S.C. § 351); Act of Oct. 15, 1962, Pub.L. No. 87-825, § 3, 76 Stat. 948, 950 (providing offset for recovery under Federal Tort Claims Act); Veterans Disability Compensation and Survivor Benefits Act of 1976, Pub.L. No. 94-433, § 404, 90 Stat. 1374, 1379: Veterans' Compensation and Program Improvements Amendments of 1984, Pub.L. No. 98-223, § 213, 98 Stat. 37, 46; Department of Veterans Affairs Codification Act, Pub.L. No. 102-83, § 5, 105 Stat. 378, 406 (1991).

construed broadly to the benefit of the veteran. *See Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967). This is all consistent with Congress's enactment of a statute that plainly requires injury and causation but plainly does not require proof of fault or accident.

The critical inquiry for compensation under 38 U.S.C. § 1151 therefore is, assuming no willful misconduct by the veteran, whether the veteran was injured by the treatment. If he was, then as the statute and legislative history make clear, regardless of VA fault or accident, the veteran is to be compensated because the VA "having undertaken to bestow a benefit, has, in fact, inflicted a loss." Because the legislative history does not reveal a clearly expressed legislative intent to require a veteran in order to receive compensation to show that he suffered an injury as the result of faulty medical treatment or an accident occurring during treatment, the Secretary has not made the "'*extraordinary showing* of . . . intentions'" necessary to warrant departure from the plain meaning of the text. *Glaxo Operations*, 894 F.2d at 396 (emphasis in original) (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984)).

C.

The Secretary argues that this court must defer to the VA's long-standing regulations purporting to interpret the statute as requiring fault or accident. For several reasons we will not defer. As discussed above, Congress has spoken clearly on the issue of fault or accident, and unambiguously has not required it. Congress has not left any gap in the statu-

tory language that might give the Secretary discretion to require fault or accident. Therefore we owe no deference to the VA's interpretation. *Glaxo Operations*, 894 F.2d at 398.

In addition, the VA's interpretation of the statute was not contemporaneous with the statute's enactment. Rather, the VA first absolutely required fault or accident some 10 years after the enactment of the original statutory provision, and 5 months after reenactment of the statute which the VA has always maintained was the same in scope as the original enactment. In such circumstances the force of the regulation is substantially weakened. *See id.* at 398-99.

Finally, we reject the Secretary's urging for deference based on the fact that the regulation or its equivalent is long-standing. *See Horner v. Andrzjewski*, 811 F.2d 571, 574 (Fed.Cir.1987). Although the regulation has existed for nearly 60 years, it was not expressly made judicially reviewable until 1988. In that year, Congress established under Article I of the Constitution the Court of Veterans Appeals to provide for the first time judicial review of decisions of the VA. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105 (1988). Jurisdiction for appeals from the Court of Veterans Appeals lies exclusively in this court. *Id.* Until 1988, as stated by Congress, the VA stood "in 'splendid isolation as the single federal administrative agency whose major functions [we]re explicitly insulated from judicial review.'" H.R.Rep. No. 100-963, 100th Cong., 2d Sess. 10, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5791. Many VA regulations have aged nicely simply because Congress took so long to provide for

judicial review. The length of such regulations' unscrutinized and unscrutinizable existence, however, does not in itself form a basis for us to presume they are valid and therefore defer to them. If anything, Congress's lengthy deliberation and carefully crafted scheme for judicial review of VA regulations counsels for vigorous review.

We also reject the Secretary's argument that Congress ratified the fault or accident element in 1934 when it reenacted the 1924 Act. Even if, as the Secretary argues, in this case Congress could be presumed to be aware of the VA's regulatory interpretations of the statute, *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n. 66, 102 S.Ct. 1825, 1841 n. 66, 72 L.Ed.2d 182 (1982), there has been no showing that the VA definitively interpreted the statute as requiring proof of fault or accident prior to the time Congress reenacted the statute. Reenactment occurred on March 28, 1934, while the Administrator's definitive, restrictive stance was taken later in August of that year. Nor does the Congressional discussion preceding reenactment cited by the parties even refer to the VA regulation. As the discussion above indicates, Congress initially enacted a broad statute that would encompass instances of fault and accident leading to injury, but was not limited to them. That the VA deemed fault or accident important at the time of reenactment does not show that Congress intended to so limit the statute. Consequently, "[i]n such circumstances we consider the [1934] reenactment to be without significance." *United States v. Calamaro*, 354 U.S. 351, 359, 77 S.Ct. 1138, 1144, 1 L.Ed.2d 1394 (1957); *see Pierce v. Underwood*, 487 U.S. 552, 566-68, 108 S.Ct. 2541, 2550-51, 101 L.Ed.2d 490 (1988).

The VA required Gardner to prove that as the result of his medical treatment he suffered an injury or an aggravation of an injury, *and* either that the particular treatment was performed with negligence or that during the treatment an accident occurred. Congress, however, did not require the veteran to discover and prove precisely what happened during his treatment (*e.g.*, that the VA personnel acted negligently or that a mishap occurred), a time when perhaps the veteran was not even conscious. To impose on the veteran the obligation to prove an element of accident or fault is to curtail drastically the statutory right conferred on him by 38 U.S.C. § 1151. The Secretary tells us not surprisingly that a no-fault scheme is more expensive than a fault-based scheme. That however would be Congress's concern. The VA's desire to pay less compensation than Congress mandated could not authorize the extra-statutory legislation embodied in 38 C.F.R. § 3.358(c)(3). "The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller v. United States*, 294 U.S. 435, 440, 55 S.Ct. 440, 442, 79 L.Ed. 977 (1935). We hold that 38 C.F.R. § 3.358(c)(3) is therefore invalid.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF
VETERANS APPEALS

No. 90-120

FRED P. GARDNER, APPELLANT

v.

EDWARD J. DERWINSKI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE

On Appeal From the Board of Veterans' Appeals

(Argued August 7, 1991 Decided November 25, 1991)

Before NEBEKER, *Chief Judge*, and HOLDAWAY and IVERS, *Associate Judges*.

NEBECKER, *Chief Judge*: Appellant, Fred P. Gardner, seeks reversal of a January 26, 1990, Board of Veterans' Appeals' (BVA) decision denying him entitlement to Department of Veterans Affairs (VA) benefits. The BVA ruled against appellant pursuant to 38 C.F.R. § 3.358(c)(3) (1990), on the grounds that his injuries were not a result of negligence or accident on the part of his VA doctors. We hold that 38 C.F.R. § 3.358(c)(3) is contrary to statutory au-

thority and outside the scope of the VA's authority. We therefore remand the case to the BVA for further proceedings on the claim.

Appellant, a veteran of World War II, underwent back surgery for a non-service-connected back condition in June of 1986 at a VA medical facility. R. at 1. He asserts that his left leg suffered severe nerve and muscle damage as a result of surgery. On November 18, 1988, he filed a claim for compensation, under 38 U.S.C. § 1151 (formerly § 351), alleging that his left leg condition was secondary to the 1986 back surgery. R. at 263. The V.A. Regional Office (RO) denied his claim by a rating decision on January 26, 1989, finding no indication of negligence in the surgical procedure. R. at 267, 268. On September 5, 1989, the VARO confirmed this rating action, relying on 38 C.F.R. § 3.358(c)(3), which requires either accident or fault on the part of the VA for the veteran to receive compensation for increased disability for any aggravation or injury resulting from treatment at a VA facility. The BVA affirmed the RO decisions on January 26, 1990, stating, "we do not find evidence of fault on the part of the VA, or of the occurrence of an unforeseen, untoward event, resulting in permanent additional disability. Accordingly, entitlement to the benefits requested is not demonstrated." R. at 303. Appellant subsequently appealed to this Court under 38 U.S.C. § 7266 (formerly § 4066).

Analysis

Resolution of appellant's claim requires the Court to focus on whether 38 C.F.R. § 3.358(c)(3) properly implements 38 U.S.C. § 1151 by including an

element of fault. Section 1151 reads in pertinent part:

> Where any veteran shall have suffered an injury or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation . . . not the result of the veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation . . . shall be awarded in the same manner as if such disability, aggravation, or death were service-connected.

The regulation at section 3.358(c)(3), which interprets the statute, reads in pertinent part:

> Compensation is not payable for either the contemplated or foreseeable after results of approved medical or surgical care properly administered, no matter how remote, in the absence of a showing that additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of VA. However, compensation is payable in the event of the occurrence of an "accident" (an unforeseen, untoward event), causing additional disability or death proximately resulting from VA hospitalization or medical or surgical care.

Section 7261(a)(3)(C) (formerly § 4061(a)(3)(C)) of title 38 requires the Court to "hold unlawful and set aside . . . rules and regulations issued or adopted by the [Secretary] . . . found to be . . . in

excess of statutory jurisdiction, authority, . . . or in violation of a statutory right." Determining whether section 3.358(c)(3) is in violation of statutory authority involves examining the language of the statute, and the interpretation given it by its administering agency. *See Brock v. Writer's Guild of America West, Inc.*, 762 F.2d 1349, 1353 (9th Cir. 1985).

The Language of the Statute

Determining a statute's plain meaning requires examining the specific language at issue and the overall structure of the statute. *Bethesda Hospital Assn. v. Bowen*, 485 U.S. 399, 403-405 (1988). Here, the language of the statute provides that any veteran who has a disability incurred or aggravated during the course of a VA-authorized health examination, treatment, or vocational rehabilitation is entitled to have that disability treated as service-connected. Both the parties and amici agree that, under a literal reading, the statute's language does not indicate an element of fault. Appellee's Response to Order of the Court to File a Supplement Memorandum (App. Resp.) at 4, and brief of J. Michael Hannon, amicus curiae (Hannon brief) at 5. This plain meaning must be given effect unless a "literal application of [the] statute will produce a result demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

The Secretary focuses on the language "injury resulting in additional disability" to support the argument that giving full play to the plain meaning of section 1151 would lead to ludicrous results. App.

Resp. at 5. This language, according to the Secretary, could encompass *any* change in the veteran's physical condition as a result of a medical procedure. For example, a non-service-connected disability, such as diabetes, could be converted into a service-connected disability if the disease led to amputation of an extremity. Such a loss could then be construed as an injury resulting in an additional disability and, therefore, be compensable under the plain language of the statute.

The "absurd result" exception to the plain meaning rule is, however, narrow and limited to situations "where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring). Absent an absurd result, the plain meaning of the statute will be applied unless such an application is contrary to the apparent intention of Congress. *Thompson/Center Arms Co., A Div. of the K.W. Thompson Tool Co. v. United States* 924 F.2d 1041, 1044-45 (Fed. Cir. 1991) ("[o]nly very clear evidence of contrary legislative intent can displace the plain meaning of a statute").

Furthermore, as Amicus Hannon points out, it is not unlikely that Congress designed a no-fault statute given its experience in enacting legislation concerning both common law negligence and the no-fault approach to liability. Hannon brief at 5. *See, e.g.*, 28 U.S.C. §§ 2671-2680 (1988) (Federal Torts Claim Act); 33 U.S.C. §§ 901-950 (1988) (Longshore and Harbor Workers' Compensation Act).

The Secretary argues that the language of the statute indicates an intent to limit the applicability

of section 1151 to cases in which fault can be demonstrated on the part of the Department or its agents. According to the Secretary, statutory language precluding compensation when the *veteran* is at fault implies that compensation is payable only when VA personnel are at fault. We do not find such an implication. The statute imposes only two limitations on the granting of service-connected benefits; first, as long as the injury or aggravation occurs "as a result of" exposure in one of four circumstances and, second, is not a "result of such veteran's willful misconduct," benefits will be made available. 38 U.S.C. § 1151. This language reveals that Congress considered the issue of fault while drafting the statute and suggests that, although fault of the veteran is relevant to a determination of eligibility for compensation, the fault of VA personnel is not. As the Supreme Court has noted, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

The Secretary further argues that section 358 (c)(3) does accommodate no-fault, non-negligent situations since it allows recovery when injury is caused by "accident." The Secretary's definition of "accident", however, does not include certain ill effects which may flow from surgery even though the operation is performed with the greatest possible degree of skill and precaution and no one is at fault. Although allowing recovery when injury is the result of accident increases the number of cases compensable under section 1151, foreseeable consequences of

medical care and treatment, no matter how remote, are still excluded under section 358(c)(3). The plain language of section 1151 places no such limitations on recovery.

Legislative History

Where a statute's language is plain, and its meaning clear, no room exists for construction. There is nothing to construe. *See Lewis v. United States*, 92 U.S. 618 (1876). Yet, the Secretary urges us to peruse the legislative history of section 1151 for proof that the plain meaning of section 1151 was not intentional. Legislative records contemporaneous with section 1151's precursor, section 213 of the World War Veterans' Act, Pub. L. No. 68-242, 43 Stat. 607 (1924), contain little or no congressional comment with respect to that section of the Act. The Secretary points to statements made by General Frank T. Hines, then Director of the Veterans' Bureau, which mentioned the need for a provision to compensate veterans hurt through medical negligence. *World War Veterans' Legislation: Hearings before the Comm. on World War Veterans' Legislation*, 68th Cong., 1st Sess., 113 (1924). In those same hearings, however, General Hines also made comments recommending a no-fault statute. *Id.* at 114. The Secretary's arguments are not persuasive.

Finally, the Secretary asserts that congressional failure to modify the VA's interpretation when it amended section 1151 signaled implicit congressional approval of section 3.358(c)(3). Although at times "[c]ongressional reenactment of a statute can strengthen a regulation's claim to validity, reenactment cannot save a regulation which contradicts the requirements of the statute itself," *i.e.*, the statute's

plain meaning. *Horner v. Andrzjewski*, 811 F.2d 571, 575 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 912 (1987). Reenactment of section 1151, therefore, could not have validated or ratified 38 C.F.R. § 3.358 (c)(3), where the language of the regulation continued to be inconsistent with the statute's plain meaning. *See Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936) (a regulation not in harmony with authorizing statute is a mere nullity).

Administrative Agency's Interpretation

The last step of the Court's inquiry involves examining the administrative agency's interpretation of section 1151. Section 501(a) of title 38, United States Code, gives the Secretary authority to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA] and are consistent with those laws." 38 U.S.C. § 501(a), Pub. L. No. 102-83, § 501(2)(a), 105 Stat. 378, 386 (1991).

Given that authority, the Secretary encourages the Court to defer to the VA's interpretation of Section 1151, citing to the principle that great weight is attached to the construction given a statute by an administrative agency. *United States v. Jackson*, 280 U.S. 183 (1930). The Secretary fails to recognize that although courts frequently grant deference to an administrative agency's interpretation of an applicable statutes, this is true only when the statute is unclear. *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981). Furthermore, even where coutrs grant deference, they are not bound by the administrative agency's construction: "the courts are the final authorities on issues of statutory construction." *Id.* at 32.

Therefore, given the plain meaning of section 1151, and the inconsistency of the administrative agency regulation with the statute, the plain language of section 1151 must be implemented. *See, e.g., Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989); *International Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697, 719 (D.C. Cir. 1987). The Court holds 38 C.F.R. § 3.358(c)(3) unlawful as exceeding the authority of the Secretary and in violation of the statutory rights granted to veterans by Congress under section 1151. Accordingly, the decision of the BVA is REVERSED and the matter is REMANDED for further proceedings.

Special Appreciation

The Court is indebted to Mr. J. Michael Hannon, esq., of Thompson, McGrail, O'Donnell & Harding, who, on the court's request, wrote an amicus brief and presented oral argument. His superb analysis of the issues involved was of tremendous value to the Court and refuted the argument, often advanced by attorneys unfamiliar with veterans' benefits law, that the complexity of the law places them at a considerable disadvantage. The Court also expresses its thanks to counsel for the Secretary and to the Paralyzed Veterans of America, the National Veterans Legal Services Project, and the Vietnam Veterans of America for their significant contributions.

APPENDIX C

UNITED STATES COURT
OF VETERANS APPEALS

No. 90-120

VA File No. 20 066 280

FRED P. GARDNER, APPELLANT

v.

EDWARD J. DERWINSKI,
Secretary of Veterans Affiairs, APPELLEE

[Entered Jan. 13, 1992]

JUDGMENT

The opinion heretofore entered in this case being a decision of the Court,

Judgment is hereby entered in accordance therewith, this 10th day of January, 1992.
Dated: Jan. 13, 1992

FOR THE COURT:

/s/ Robert F. Comeau
ROBERT F. COMEAU,
Clerk of the Court

APPENDIX D

[LOGO]

C 20 066 280

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

Docket No. 89-21 827

IN THE APPEAL OF FREDDY P. GARDNER

FINDINGS AND DECISION

[Date Jan. 28, 1990]

THE ISSUE

Entitlement to benefits pursuant to 38 U.S.C. 351 for additional disability of the left lower extremity caused by treatment rendered by the Department of Veterans Affairs during hospitalization from June 16, 1986, to July 10, 1986.

REPRESENTATION

Appellant represented by: Veterans Commission, Texas

WITNESS AT HEARING ON APPEAL

Appellant

CONSULTATIONS BY THE BOARD

Nancy Phillips, Staff Legal Adviser

CONTENTIONS

The appellant contends that as a result of back surgery, he developed severe nerve damage in the left leg, resulting in pain, atrophy, and weakness; that, since the surgery, his left ankle is severely impaired, and that he now has to wear a leg brace.

THE EVIDENCE

The appellant had active service from April 1953 to January 1955.

The appellant was admitted to a Department of Veterans Affairs (VA) hospital on April 23, 1986, with sensory neuropathy involving the lower extremities. Electromyographic studies of the lower extremities showed a radiculopathy, bilaterally, at L5, S1 with the possibility of spinal stenosis and degenerative joint disease. A CAT scan was compatible with a large central herniated disc L4-L5. On orthopedic evaluation, it was recommended that a series of caudal blocks be performed. He derived benefit from the spinal blocks, and was discharged on May 17, 1986. The diagnoses included large central herniated disc at the L4, L5 level.

The appellant was admitted to a VA hospital on June 16, 1986. He stated that the caudal blocks had helped somewhat, but he could still not walk to any degree without pain. A myelogram showed a large central herniated disc at the L4-5 level. On June 20, 1986, he underwent complete laminectomy of L4-5 with excision of a large herniated nucleus pulposus at L4, centrally. Pathologic findings included marked constriction at the L4-5 level of the spinal cord with a vary large centrally herniated nucleus pulposus at the L4 level causing increase in the spinal stenosis.

Postoperatively, the appellant did well. He was gradually mobilized. At the time of discharge, on July 10, 1986, he was ambulatory with the assistance of a cane. He had slight dorsiflexor weakness, primarily in the extensor hallucis longus of the left foot, which decreased during the hospital stay. At the time of discharge, it was felt that his dorsiflexors were strong. He had slight difficulty with walking because of perceived weakness in the left ankle. The final diagnoses included herniated nucleus pulposus at L4 with resultant spinal stenosis at L4-5 inner spaces.

An August 1986 statement from J. Lindsay, M.D., reflects that the appellant was confined to a nursing home and was totally disabled. Sciatic neuritis continued in spite of disc surgery.

The appellant underwent a VA examination for compensation purposes in October 1986. He indicated that, since surgery in 1986, he had numbness in the legs and used a cane for walking. He was living in a nursing home. He felt "electric shocks" going down the feet. He also had underarm crutches. He had weakness of the left ankle and foot. On examination, he limped to the left. He walked with the assistance of a cane and a left ankle brace. Examination of the lumbosacral spine revealed normal range of motion. There was pain on lateroflexion. Straight leg raising was positive at 65 degrees, bilaterally. There was tenderness to palpation over the lumbosacral area and the sciatic notches. Examination of the left ankle showed no heat, effusion or erythema. There was lateral/medial instability present. Range of motion was normal. Sensory examination was within normal limits. There was subjective numbness over both legs.

There was muscular wasting of the left gastrocnemius and anterior tibialis. There was normal range of motion. The appellant was wearing a hard plastic ankle brace. Ankle jerks were 1 plus on the right and 1 plus/1 minus on the left. Motor examination of the left leg and foot was Grade IV/VI.

X-rays of the left ankle showed no significant abnormality. The diagnosis was status postoperative herniated disc L4-5 with residuals; and degenerative joint disease of the left ankle with instability and mild muscular wasting of the left gastrocnemius and anterior tibialis.

VA outpatient treatment records dated from September 1986 to May 1989 reflect that on orthopedic evaluation in May 1989, it was reported that postoperatively, the appellant had suffered dorsiflexion weakness and progressive atrophy of the left calf. He also had lateral ankle instability secondary to weak ligaments of the left ankle. This was a preexisting condition, weakened by leg musculature. The assessments were weak musculature of the left leg secondary to surgery in 1986; an exacerbation of ankle instability secondary to leg weakness. It was recommended that bracing be continued.

A hearing was held before the originating agency in July 1989. The appellant's testimony was essentially an elaboration of the contentions reported earlier in this decision. A transcript of the hearing is on file.

THE LAW AND REGULATIONS

Where a veteran suffers an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or examination, and such injury

or aggravation results in additional disability or death, compensation may be awarded in the same manner as if such disability or death were service connected. (38 U.S.C. 351)

Compensation may not be payable for either the contemplated or foreseeable results of approved medical or surgical care properly administered, no matter how remote, where the evidence does not show that the additional disability or death proximately resulted through carelessness, negligence, lack of proper skill, error in judgment or other instances of indicated fault on the part of the Department of Veterans Affairs. However, compensation is payable in the event of the occurrence of an accident (an unforeseen, untoward event), causing additional disability or death proximately resulting from Department of Veterans Affairs hospitalization or medical or surgical care. (38 C.F.R. 3.358(c)(3))

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A reasonable doubt is one which exists because of an approximate balance of positive and negative evidence which does not satisfactorily prove or disprove the claim. It is a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

For entitlement to benefits under the provisions of 38 U.S.C. 351, at least two elements must be present. First, there must be some demonstration in the record that the treatment rendered resulted in some untoward result or that the treatment was negligent or showed error in judgment, lack of proper medical skill or some other instance of indicated fault. Second, it must be shown that, as a result of the aforementioned accident, negligence, etcetera there was additional disability.

In this case, it is argued that as a result of the decompressive laminectomy L4-5 in June 1986, the appellant sustained nerve damage affecting the left leg and ankle. A review of the hospital records shows some slight postoperative left foot dorsiflexor weakness, and subsequent records show atrophy of the left calf and instability of the ankle. However, there is not found in the hospital records any indication that treatment afforded the appellant was in any way negligent, or at variance with sound medical practice, or was otherwise at fault. Nor can it be concluded from the medical record that the surgery caused an untoward result in the sense contemplated by the law and regulation. That is to say, weakness of dorsiflexion is a common, foreseeable result of such surgery. Postoperatively, there was subsequently shown left calf and ankle weakness. From the clinical record, we conclude that this weakness was caused by instability of the left ankle, and was not in any way related to the decompressive laminectomy.

It it also argued that there was increased severity of the left ankle disability as a result of the surgery or

residuals thereof. However, it has not been objectively demonstrated that the underlying left ankle disability has undergone an increase in severity. Additionally, the Board is unable to conclude from the record that there is a causal relationship between the decompressive laminectomy or residuals thereof, and any increased symptomatology of the left ankle. This conclusion is reached after considering that no more than minimal sciatic neuropathy was shown after the appellant's discharge from the hospital in July 1986.

To summarize, based on the clinical record beginning with the hospitalization during June and July 1986, we do not find evidence of fault on the part of the VA, or of the occurrence of an unforeseen, untoward event, resulting in permanent additional disability. Accordingly, entitlement to the benefits requested is not demonstrated. In arriving at this conclusion, we have considered the doctrine of reasonable doubt, but find no basis for an allowance of this claim.

FINDINGS OF FACT

1. The appellant was hospitalized at a VA facility from June 16, 1986, to July 10, 1986, for performance of a myelogram and a decompressive laminectomy of L4-5 with diskectomy and excision of herniated nucleus pulposus at I 4.

2. Instability of the left ankle, which was observed postoperatively, had been present prior to the hospitalization and did not undergo permanent increase in severity as a result of the aforementioned laminectomy.

3. Treatment rendered by the VA during the hospitalization in question was in accordance with sound

medical principles, and there is no additional permanent disability which was the result of accident, negligence, lack of skill or error in judgment.

CONCLUSION OF LAW

The appellant has not incurred or aggravated any additional disability as a result of surgical accident, or as a result of negligence, carelessness, lack of proper skill, error in judgment or other instance of indicated fault on the part of the Department of Veterans Affairs. (38 U.S.C. 351; 38 C.F.R. 3.102, 3.358(c)(3))

ORDER

Entitlement to benefits pursuant to 38 U.S.C. 351 for additional disability of the left lower extremity caused by treatment rendered by the Department of Veterans Affairs during hospitalization at a VA facility from June 16, 1986, to July 10, 1986, is denied.

/s/ Stephen L. Wilkins
STEPHEN L. WILKINS

/s/ H. Sterling, M.D.
H. STERLING, M.D.

/s/ Holly E. Moehlmann
HOLLY E. MOEHLMANN

NOTICE OF APPELLATE RIGHTS: Under 38 U.S.C. 4066, added by Public Law 100-687, a decision of the Board of Veterans Appeals granting less than the complete benefit, or benefits, sought on appeal is appealable to the United States Court of Veterans

Appeals within 120 days from the date of mailing of notice of the decision. The date which appears on the face of this decision constitutes the date of mailing and the copy of this decision which you have received is your notice of the action taken on your appeal by the Board of Veterans Appeals.

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